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NO. 09-265

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

INDEPENDENCE INSTITUTE,
Petitioner,

v.

BERNIE BUESCHER, SECRETARY OF STATE,
STATE OF COLORADO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Colorado may, consistent with the First Amendment, require the disclosure of certain financial contributions and expenditures for "issue committees," *i.e.*, groups that have "a major purpose of supporting or opposing" a ballot measure and that collect or spend at least $200 toward such ballot issue election activity.

2. Whether Colorado's disclosure requirements for "issue committees" comport with this Court's decision in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), where such reporting is limited to after-the-fact disclosure of certain financial contributions and expenditures made to support or oppose a specific ballot measure.

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INTRODUCTION

This action concerns purely facial constitutional challenges to the definition of "issue committee" under Colorado campaign finance law and the corresponding registration and disclosure requirements for such committees. Under Colorado law, an "issue committee" is a group of two or more persons that has a major purpose of supporting or opposing a ballot measure and that has made or accepted contributions or expenditures of at least $200 to support or oppose a ballot measure.

Petitioner, the Independence Institute, is a non-profit 501(c)(3) policy research organization whose purpose is "to educate the public about the benefits of the free market and the dangers of expansive government." In 2005, the Institute conducted a widespread public educational campaign on Referenda C and D, two tax and financing referenda that appeared on the Colorado statewide ballot. It published issue papers and opinon editorials about the referenda, provided policy analysts for debates about the referenda, collected a variety of information for and against the referenda for its website, and aired three radio advertisements concerning the measures, for which it spent $35,000 of its own funds and received $200,000 through in-kind contributions.

The Institute contends that Colorado's definition of "issue committee" is facially unconstitutionally vague and overbroad. However, an administrative law judge had little difficulty concluding that

Colorado's definition did *not* apply to the Institute because it did not have "a major purpose" to support or oppose Referenda C and D. Thus, like myriad other voices that contributed to the public debate on these referenda, the Institute engaged in a wide range of speech activity free from regulation. The Institute was not required to register as an issue committee; it did not have to file any contribution or expenditure reports; and it was never required to reveal the identity of a single donor. In short, the provisions challenged here were readily (and narrowly) construed to exempt the Institute from regulation.

STATEMENT

1. In 2002, Colorado voters passed Amendment 27, [1] which modified and placed portions of Colorado campaign finance law in the state constitution. Colo. Const. art. XXVIII; App. 99. Under Article XXVIII, § 2(10)(a), an "issue committee" is a group of two or more persons that "has a major purpose of supporting or opposing any ballot issue or ballot question." To be an issue committee, the group must accept or make contributions of $200 or more to support or oppose a ballot measure. *Id.* Issue committees are not subject to contribution limits or restrictions on the sources of contributions. The regulation of such groups is limited to the reporting of contributions and expenditures.

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[1] Petitioners' amici state incorrectly that "*legislators* amended the state constitution." *See* Br. of Amici Curiae in Support of Pet'r ("Br. of Amici") at 5 (emphasis added). Article XXVIII was a citizen-initiated amendment.

Colorado's Fair Campaign Practices Act (FCPA), Colo. Rev. Stat. §§ 1-45-101 to -118 (2009) sets forth the relevant registration and reporting requirements for issue committees. Issue committees must register within ten days of accepting or making contributions in excess of $200 to support or oppose a ballot measure. Colo. Rev. Stat. § 1-45-108(3.3). App. 182-83. Registration statements must provide the name of the organization; a registered agent; a street address and telephone number for the principal place of operations; all affiliated candidates and committees; and the purpose or nature of the committee's interest. Colo. Rev. Stat. § 1-45-108(3). App. 131-32. Issue committees must file periodic reports that include all contributions and expenditures, including the name and address of persons who contribute $20 or more, and the occupation and employer of persons who make one-time (as opposed to aggregate) contributions of $100 or more. Colo. Rev. Stat. §§ 1-45-108(1)(a)(I)-(II), -108(2)(a); *see also* Colo. Const. art. XXVIII, § 2(5) (defining "contributions"); *id.* § 2(8) (defining "expenditures"); 8 Colo. Code Regs. § 1505-6 (1.3) (clarifying "contributions"); *id.* § 1505-6 (4.9.1) (clarifying disclosure of occupation and employer). App. 101-02, 104-05, 127-31, 142-43, 153-54.

The Secretary has rulemaking authority under both Article XXVIII and the FCPA. *See* Colo. Const. art. XXVIII, § 9(1)(b); Colo. Rev. Stat. § 1-45-111.5(1). App. 120, 140. The Secretary has promulgated several rules concerning issue committees as part of the Secretary's Rules Concerning Campaign and Political Finance. *See, e.g.*, 8 Colo. Code Regs. § 1505-6 (Rules 1.6, 1.7, 3.8,

4.15). App. 143-44, 148, 157-58.[2] Under Rule 1.7, a group will not be deemed an "issue committee" unless it both "has a major purpose of supporting or opposing any ballot issue or ballot question" *and* it "has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question." 8 Colo. Code Regs. § 1505-6 (1.7). App. 144. In addition, Rule 4.15 provides that a "multi-purpose issue committee" (an issue committee whose purposes are not limited exclusively to supporting or opposing ballot issues) need report *only* ballot issue campaign related activities, *i.e.*, contributions and expenditures accepted or made for the purpose of supporting or opposing ballot issues or questions. 8 Colo. Code Regs. § 1505-6 (4.15).[3] App. 157.

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[2] On September 17, 2009, the Secretary issued a Notice of Adoption amending several campaign finance rules. These amendments do not affect the issues in this litigation, although the Secretary notes that Rule 1.6 has been repealed in light of House Bill 09-1153, which, *inter alia*, codified the definition of an "issue" in statute. App. 181. The Notice appears at: .

[3] The Institute describes the Secretary's multi-purpose issue committee rules as "last-minute." Pet. at 20 n.9. However, as set forth in the Secretary's trial court briefs, which are part of the record below, the concept of a "multi-purpose issue committee" and the tailored reporting for such committees predates the passage of Article XXVIII; Rule 4.15 simply codified the Secretary's documented interpretation and practice since 2000. Sec'y Br. in Support of Summ. J. at 6-8, 19-20; Sec'y Combined Resp. and Reply Br. at 13, Exs. 2, 4, 9. Neither the Institute nor any other party challenged any aspect of the multi-purpose issue committee rules at the formal rulemaking hearing in October 2006. The Secretary adopted the rules on a permanent basis, effective December 4, 2006.

2. Petitioner, the Independence Institute, is a non-profit policy research organization founded in 1985 whose purpose is "to educate the public about the benefits of the free market and the dangers of expansive government." App. 2, 164. John Caldara is the Institute's President. App. 164. As a tax-exempt organization under 26 U.S.C. § 501(c)(3), the Independence Institute does not become involved in political campaigns or elections of any type; it does not endorse or campaign for ballot initiatives or referenda; and it does not engage in lobbying. App. 167-68. In its public commentary on issues related to elections, the Institute does not tell people to vote for or against any candidate or issue. *Id.*

In 2005, the Institute conducted a widespread educational campaign regarding the possible negative impact of Referenda C and D, two tax and financing measures that appeared on the Colorado statewide ballot. App. 168. The Institute published issue papers and opinion editorials about the referenda, provided policy analysts for debates and speaking engagements about the referenda, and collected a variety of information for and against the referenda for its website. *Id.* It also aired three radio advertisements that provided information on the tax implications of Referendum C and directed listeners to a website to learn more information. The ads did not explicitly urge listeners to vote yes or no on the referendum. App. 3, 169.[4] For these radio ads, the Institute spent over $35,000 of its own funds and received approximately $200,000 through in-kind contributions from an undisclosed donor. App. 55,

[4] The text of these radio ads appears at App. 53-57.

58. Colorado voters approved Referendum C but not Referendum D. App. 3.

Mr. Caldara served as the spokesman for the Institute on Referenda C and D. App. 53. Mr. Caldera has campaigned for and against ballot initiatives in the past, and he personally opposed Referendum C. App. 170. However, because the Institute's mission is to educate, not advocate, Mr. Caldara personally established and chaired an issue committee called "Vote No, It's Your Dough" as a vehicle to expressly advocate the defeat of the measures. App. 60, 170.

3. In August 2005, Richard Evans (an agent of an issue committee in favor of the referenda) filed a campaign finance complaint with the Secretary,[5] alleging that the Institute was an "issue committee" because it had engaged in efforts to oppose Referenda C and D, including paying for and airing the radio ads. App. 3. Evans claimed that the Institute had failed to register as an issue committee, open a separate bank account for its campaign activities, and disclose its contributions and expenditures.[6] *Id.* The Secretary referred the complaint to the Colorado Office of Administrative

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[5] In 2005, Gigi Dennis was the Colorado Secretary of State. Mike Coffman succeeded Ms. Dennis on January 9, 2007; Respondent Bernie Buescher succeeded Mr. Coffman on January 14, 2009. This brief will simply refer to "the Secretary," regardless of who occupied the position at the time.

[6] Evans also claimed (unsuccessfully) that Mr. Caldara's issue committee, "Vote No, It's Your Dough," violated campaign finance law by failing to report all contributions it had received from the Institute. App. 77-80.

Courts, as required by Colo. Const. art. XXVIII, § 9(2)(a). *Id.*

While the administrative proceedings were pending, the Institute filed this lawsuit against the Secretary, raising constitutional challenges to the definition of "issue committee" in Article XXVIII and the corresponding registration and disclosure requirements for issue committees under the FCPA. The Institute alleged that the definition of issue committee is unconstitutionally vague and overbroad, and that the disclosure requirements for issue committees violate both free expression and association and the right to anonymous speech. The Institute sought to enjoin the administrative proceeding on grounds that the district court should resolve the constitutional challenges first. The court denied the Institute's motion for preliminary injunction. App. 94.

The administrative hearing went forward, and the administrative law judge ("ALJ") issued a decision in November 2005 concluding that the Institute was *not* an issue committee. App. 72, 81. The ALJ considered several factors, including the length of time the Institute had been in existence, the purpose for which it was established, the various issues it had been involved in, its organizational structure, and the amount spent by the Institute on the three radio ads as a proportion of its annual budget. App. 17, 65-72. In view of these factors, the ALJ concluded that Referenda C and D were "not a major purpose or focus of the Institute." App. 58-59. Accordingly, the ALJ held that the Institute was not an issue committee, and therefore had not violated the

registration or disclosure provisions in Article XXVIII or the FCPA. App. 4, 72.

4. Despite this favorable ruling, the Institute continued to pursue its claims in this case. In an order dated December 14, 2005, the district court granted the Secretary's motion to dismiss the complaint to the extent it asserted any as-applied challenges. App. 40. In so doing, the trial court stated that its determination in this suit would be "limited to [Plaintiff's] facial challenges and shall not extend to any as-applied challenges." *Id.* The Institute never contested this ruling.[7] In May 2007, the district court granted summary judgment on all claims in favor of the Secretary. App. 33-39. The district court observed that it was "apparent from the ALJ's ruling that discerning a group's 'major purpose' did not prove overly difficult." App. 35.

5. In November 2008, the Court of Appeals affirmed the trial court's judgment. It held that the definition of "issue committee" in Article XXVIII, §

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[7] Despite the December 14 order, the Institute later attempted to argue in the district court that the registration and disclosure requirements were unconstitutionally burdensome because they "disproportionately impact small educational groups and issue advocacy organizations." App. 21, 22. The district court concluded that the Institute lacked standing to bring this "as-applied" claim. App. 37-38. In the Court of Appeals, the Institute abandoned its "disproportionate impact" argument and revised its burdensomeness claim yet again, contending that the requirements are "unconstitutional as-applied to multi-purpose issue committees." App. 22-23. The Court of Appeals held that this claim was barred by the district court's December 14 order. App. 23. The Institute does not seek certiorari review on this claim.

2(10)(a) is neither facially vague nor overbroad. App. 10-20. It further held that the FCPA disclosure requirements do not violate the right to engage in anonymous speech and association. *Id.* 23-28.

In a special concurrence, Judge Connelly observed that the phrase "a major purpose" easily withstands a facial challenge without any narrowing construction beyond what the Secretary has already provided. App. 29-30 (Connelly, J., specially concurring). Similarly, he observed that the Secretary's *administrative regulations* (not judicial construction) have obviated any overbreadth concern by requiring "multi-purpose issue committees" to report only ballot-specific contributions and expenditures. *Id.*

REASONS FOR DENYING THE PETITION

This case does not warrant the Court's exercise of its certiorari jurisdiction. *First*, this case presents no justiciable case or controversy between the Institute and the Secretary. The Independence Institute brings purely facial constitutional challenges to Colorado's campaign finance provisions governing issue committees, yet it is undisputed here that the Independence Institute is *not* an issue committee under Colorado law. All sides agree that the Institute's activities do not require it to register or report as an "issue committee." The Institute is therefore unaffected by the registration and disclosure provisions it challenges here as facially unconstitutional. The record before the Court reflects that in practice, these provisions do not apply to policy groups like the Institute, and thus cannot

infringe their rights. Any dispute between the Institute and the State is therefore, at best, hypothetical. The lack of a concrete legal dispute, combined with the fact that no record was developed below on what is a significantly revised overbreadth claim on appeal, render this case a poor vehicle to address the substantive questions presented.

Second, even if it were properly presented, the alleged conflict between the Colorado intermediate appellate state court ruling here and the split panel decision in *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008) does not warrant this Court's review. The Colorado provisions challenged here are distinguishable from North Carolina's regulatory scheme. In particular, Colorado law, as narrowly construed by lower Colorado courts and the Secretary's administrative regulations, require multi-purpose issue committees to disclose only contributions and expenditures that are unambiguously related to ballot issue campaigns. Moreover, the Colorado Supreme Court has not yet had an opportunity to issue any final word interpreting the scope of the challenged provisions as a matter of state law, let alone weigh in on their federal constitutionality. The Colorado Supreme Court may well choose to do so in a future case that, unlike this one, presents an actual controversy.

Finally, the Colorado Court of Appeals properly rejected the Institute's facial constitutional challenges, leaving open the opportunity for a true multi-purpose issue committee (that is, a group actually subject to the challenged provisions) to bring a future as-applied challenge in a proper case.

The Court of Appeals' ruling is consistent with the First Amendment and represents a straightforward application of this Court's prior decisions. Contrary to the Institute's contention, Colorado does not attempt to regulate groups that merely "speak out" on ballot measures, or even groups that only "occasionally engage in ballot measure advocacy." Pet. 3, 5. As the Institute's own case demonstrates, Colorado law provides ample protection to the freedom of speech and association.

I. There is no justiciable controversy between the Institute and the Secretary warranting review of the questions presented.

The Institute brings strictly facial challenges to Colorado's campaign finance provisions; consequently, it faces a "heavy burden" in advancing its claims. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 207 (2003).

This Court has observed that facial challenges are "disfavored," noting that "[c]laims of facial invalidity often rest on speculation" and " raise the risk of premature interpretation of statutes on the basis of factually barebones records." *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008) (internal quotations omitted). "Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law

broader than is required by the precise facts to which it is to be applied." *Id.* (internal quotations omitted).

In a facial challenge, the State often has had no opportunity to implement the challenged law; its courts have had no occasion to construe it in the context of actual disputes, or to accord it a limiting construction to avoid constitutional questions. *See id.* at 1190. This case is not a pre-enforcement facial challenge in which a litigant alleges a fear that the law may be enforced against him. Here, although a complaint actually was brought against the Institute, the Institute has already *won*. The provisions challenged here have been held conclusively *not* to apply to this Petitioner.

A. The Institute is unaffected by the campaign finance provisions it challenges here.

It is undisputed that the Institute is not an issue committee and is not subject to the registration and reporting provisions it challenges here as facially unconstitutional. Not only did the Institute prevail in the underlying administrative proceedings, but the undisputed record establishes that – unless it fundamentally changes its mission and operations – the Institute would *never* meet the Colorado definition of an issue committee because its activities are strictly educational. The Institute does not become involved in political campaigns or elections of any type; it does not endorse or campaign for ballot initiatives or referenda; and it does not advocate a yes or no vote on ballot issues – and in fact, to do so would jeopardize its status as a tax-exempt

organization under 26 U.S.C. § 501(c)(3). App. 167-68. Thus, the Institute cannot meet the definition of an issue committee because, regardless of the organization's purposes, the Institute does not actually "support or oppose" any ballot issue.

The Institute nevertheless remains free to "speak out" about ballot issues, as it regularly does through issue papers and op-eds it authors; the policy analysts it provides for speaking engagements; the debates and symposia it sponsors; the information it collects for its website; and even the broadcast and print ads it issues, such as the radio ads it aired during its education campaign on Referenda C and D. App. 165-69. It may even spend significant sums of money on such efforts – all without having to register as an issue committee or disclose any donor.

This case therefore presents no concrete dispute (or even an imminent future dispute) between this Petitioner and the Secretary warranting this Court's review of the substantive questions presented. Unless the Institute radically changes its activities or operations – and it has given no indication of any plans to do so, nor could it without apparently jeopardizing its 501(c)(3) status – it is free to continue its educational activities without being subject to regulation as an issue committee. In light of the resolution of the underlying administrative proceedings and the state courts' narrow construction of Colorado campaign finance law, the Institute no longer can allege an "actual and well-founded fear that the law will be enforced against" it. *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). Any threat to the Institute

purportedly latent in the mere existence of these provisions does not exist, where, as here, these provisions "clearly fail[] to cover [its] conduct." *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003).

"[E]ven where allegations of unconstitutionality on the face of a regulation are made, a concrete factual dispute is required to make the case justiciable." *Nat'l Treasury Employees Union v. Kurtz*, 600 F.2d 984, 988 (D.C. Cir. 1979); *see also Wisconsin Right to Life, Inc. v. Paradise*, 138 F.3d 1183, 1186 (7th Cir. 1998) ("A litigant cannot create a case or controversy just by making an untenable 'facial' attack on a statute; actual injury and redressability are essential no matter how the challenge is cast"), *cert. denied*, 525 U.S. 873 (1998). The Institute asks this Court to intervene to resolve what, on this record, is no more than a theoretical or ideological controversy, and which would require this Court to rely wholly on speculation and hypothetical situations not before the Court. Even if it wished to resolve the questions put forth in the Petition, the Court should wait for a case presenting a justiciable controversy brought by plaintiffs who can allege injuries that would be actually redressed if they succeed. This is not such a case.

B. The record here permits no meaningful evaluation of the Institute's significantly revised claims of overbreadth.

When this litigation began, the Institute's claim of facial overbreadth centered on the Colorado Supreme Court's opinion in *Common Sense Alliance v.*

Davidson, 995 P.2d 748 (Colo. 2000). There, the Colorado Supreme Court examined the definition of "issue committee" under a prior version of the FCPA. The court expressed concern that if the definition were construed to encompass groups not *originally* formed "for the purpose of" supporting or opposing a ballot measure, the designation as an "issue committee" would trigger the FCPA reporting requirements and force disclosure of *all* contributors to a committee, including those who had no opportunity to choose whether to contribute to an organization required to make public disclosures. *Id.* at 756.

In view of *Common Sense Alliance*, the Institute alleged in their complaint that the current definition of "issue committee" is unconstitutionally overbroad because any organization that falls within the definition must disclose *all* contributions received under Colo. Rev. Stat. § 1-45-108, regardless of the donor's or the organization's purpose in receiving the contribution.[8] In other words, the Institute contended in the district court that the definition of "issue committee" is facially overbroad because a multi-purpose organization that is deemed to be an "issue committee" must disclose the identities of all of its donors, and all contributions received, not just those related to a ballot measure. However, the Secretary's Rule 4.15 clarified that a "multi-purpose issue committee" (meaning, an issue committee that has purposes other than exclusively ballot issue campaigning) need only report contributions and

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[8] Compl. ¶¶ 34, 36. The Institute's complaint is part of the record below.

expenditures related to its ballot issue advocacy, and not any other financial activity.

Following the promulgation of Rule 4.15, the Institute completely recast its claim of overbreadth, no longer contending that the definition is unconstitutionally overbroad because of the *scope of the contributions* an issue committee must disclose. Instead, the Institute argued (although the claim appears nowhere in its complaint) that the definition is facially overbroad because it reaches groups, like the Institute, that do not have a single major purpose of supporting or opposing ballot initiatives.

In its cross-motion for summary judgment in the district court, the Institute argued that the definition of "issue committee" and the corresponding disclosure provisions under the FCPA are designed to "punish" purely "educational" groups (such as the Institute) merely for "speaking out" about a ballot measure.[9] The Institute repeatedly stressed that it exists strictly to "educate" the public, nothing more.[10]

In the Court of Appeals, however, the Institute asserted for the first time that it "occasionally

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[9] Pl.'s Cross-Mtn. at 1-3, 8. The parties' cross-motions for summary judgment are part of the record below.

[10] *Id.* at 4-5 (discussing the Institute's educational activities in connection with Referenda C and D); *id.* at 10 (stating that the Institute's activities were "educational"; that it was "careful not to tell anyone to vote yes or no on the referenda"; and that it was merely "attempting to educate Colorado citizens about important issues"); *id.* at 15 (stating that the Institute engages only in "issue discussion").

engage[s] in ballot issue advocacy"[11] – an assertion both directly contrary to the arguments the Institute made to the ALJ and the district court, and unsupported by the record in this case. App. 167-68.

In its Petition, the Institute maintains the revised version of its overbreadth claim - that the definition is facially overbroad because it "includes groups that occasionally engage in ballot measure advocacy." Pet. 5. It appears, however, to have backed away from its assertions in the Colorado Court of Appeals that the *Institute* occasionally engages in actual ballot issue advocacy.

Because the Institute has significantly changed its facial overbreadth claim during the course of this litigation, there is now a mismatch between the Institute's current claim of overbreadth and the record developed below. These factors further warrant against this Court's intervention here. Because the Institute's overbreadth allegations took an entirely different focus in the trial court, the Secretary had no opportunity to develop a record in response to the Institute's current iteration of this claim, unveiled long after the close of discovery.

For example, in Colorado, most groups or organizations that want to expressly advocate for the passage or defeat of a particular ballot measure establish a separate issue committee for that purpose and then terminate that committee after the election – just as Mr. Caldara did with "Vote No, It's

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[11] Aplt. Opening Br. at 12, 19, 28, 35. The parties' briefs in the Colorado Court of Appeals are part of the record below.

Your Dough." For these groups, virtually without exception, ballot issue advocacy is not merely "a" major purpose, but the *exclusive* purpose of the group. Given the opportunity to develop a record based on the Institute's revised overbreadth claim, the Secretary would have shown that true "multi-purpose" issue committees in Colorado are exceedingly rare, if not virtually nonexistent. Coupled with the fact that Rule 4.15 requires the rare "multi-purpose" issue committee to disclose only contributions and expenditures made for ballot issue advocacy purposes, the Secretary would have developed a record to rebut the Institute's current version of its overbreadth claim to show that, in actual practice, the provisions are never applied to speech that is unconnected to ballot issue advocacy.

The disconnect between the substantive questions presented in the Petition and the record developed below only reinforces the lack of an actual legal controversy presented by this case. If, in fact, Colorado's definition of issue committee is as broad as the Institute claims, then surely there will be no shortage of multi-purpose issue committees able to present actual examples of its application that Colorado courts – and this Court, if it then chooses – can address. This case presents a purely theoretical facial challenge; the record here presents no concrete example of the law's allegedly overbroad application to any true multi-purpose issue committee, and thus offers no reason for this Court to intervene.

C. The Institute's allegations of the growing risks of harassment stemming from disclosure rest entirely on speculation and anecdotal accounts from other states.

The Institute and its amici urge the Court to review the Institute's claims regarding the right to anonymous speech, both pointing to the easy accessibility of disclosure information on the Internet and suggestions of harassment and retribution against contributors in controversial ballot campaigns – in *other* states. Pet. 27-28; Br. of Amici 14-17, 21-22.

Because the Institute is not an issue committee, it is not required to reveal the identity of a single donor. Thus, the Institute cannot show that its members face even a theoretical risk of "threats, harassment, or reprisals" linked to the challenged disclosure provisions. *See Buckley v. Valeo*, 424 U.S. 1, 74 (1976). Indeed, the record in this case is utterly devoid of any evidence of harassment or intimidation being wrought against any issue committee in Colorado (or a donor to such a committee). Even assuming the newspaper articles cited in the Petition could constitute valid record evidence here, the only article cited by the Institute or its amici referring to the alleged repercussions of disclosure in *Colorado* discusses picketing and boycotting – not harassment. Pet. 27 (citing Amy Bounds, *Gay rights advocates picket Boulder Cineplex*, Rocky Mountain News, Nov. 30, 2008). In response to allegations of harassment of Prop 8 donors in California, a federal

district court recently observed that many of the acts complained of were actually lawful means of voicing dissent; indeed, picketing and boycotts are lawful forms of peaceful civil protest that are protected by the First Amendment. *See ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1218 (E.D. Cal. 2009).

The record in *this* case presents not a single documented instance of harassment. Furthermore, the Petitioner here does not face even a theoretical risk of harassment or reprisals because it is not subject to the disclosure provisions. Anecdotal accounts of events in other states – matters not before the Court here – do not warrant this Court's intervention here, let alone justify the wholesale invalidation of Colorado's disclosure provisions.

II. There is no genuine conflict between the Colorado Court of Appeals and the Fourth Circuit warranting this Court's review.

The Institute urges this Court to grant review because the decision of Colorado's intermediate state appellate court appears to conflict with the Fourth Circuit's decision in *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008) ("*NCRTL*"). Pet. 19-22. However, the provisions challenged here regulate only speech that is unambiguously ballot issue campaign related. By contrast, the North Carolina scheme in *NCRTL* threatened to regulate a substantial amount of protected speech because it imposed significantly greater burdens on groups deemed to be political committees.

First, the North Carolina definition of "political committee" at issue in *NCRTL* incorporated no minimum monetary threshold. A group in North Carolina that made *any* contributions or expenditures, no matter how small, fell within the definition of "political committee" if it met any of the other statutory characteristics. *See NCRTL*, 525 F.3d at 286. By contrast, to meet Colorado's definition of "issue committee", a group must not only have "a major purpose" of supporting or opposing a ballot measure, but it must also collect or spend $200 or more for the purpose of supporting or opposing the ballot issue or ballot question. Colo. Const. art. XXVIII, § 2(10)(a)(II); 8 Colo. Code Regs. § 1505-6(1.7(b)). App. 105, 144. Thus, even a group that actively supports or opposes a ballot issue will not be regulated as an issue committee if that $200 threshold is not reached.

Second, in North Carolina, a political committee was required to file a statement of organization revealing all financial depository information for the organization, as well as report all contributions and expenditures made by the committee. *See NCRTL*, 525 F.3d at 286. That is, North Carolina's political committee burdens applied "across the board to *all* of an organization's activities." *Id.* at 303; *see also id.* at 331 (Michael, J., dissenting) (regulations "impact an organization's issue advocacy by requiring disclosure of all donor information and financial receipts and disbursements and by imposing limits on all contributions to it"). Colorado, by contrast, has established tailored reporting requirements for multi-purpose issue committees. Under Rule 4.15, any Colorado issue committee that is not exclusively

dedicated to supporting or opposing ballot issues need report only those financial contributions and expenditures unambiguously related to the committee's ballot issue campaign activity. *See* 8 Colo. Code Regs. § 1505-6(4.15). App. 157. Moreover, while a multi-purpose issue committee must establish a separate bank account for its ballot issue advocacy, *see* 8 Colo. Code Regs. § 1505-6(4.15(b)), App. 157, it is not required to reveal "all financial depository information" of the organization. *Compare NCRTL*, 525 F.3d at 286.

Third, under the North Carolina law, a group deemed to be a political committee was subject to limits on contributions it could receive during an election cycle from any individual or entity. *Id.* at 286. In Colorado, an "issue committee" is not subject to any contribution limits.[12]

Colorado's provisions are thus distinguishable from the scheme examined by the Fourth Circuit in *NCRTL*. To the extent Petitioner cites cases outside the Fourth Circuit that apply *NCRTL* and purportedly conflict with the Court of Appeals' ruling, *see* Pet. 18-19, those cases concerned campaign finance laws far broader than even the provisions challenged in North Carolina, let alone here. For example, the Florida law at issue in *Broward Coalition of Condominiums, Homeowners Ass'n & Cty. Orgs. Inc. v. Browning*, 2008 WL 4791004 (N.D. Fla. Oct. 29, 2008), incorporated no "major purpose" requirement whatsoever. The

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[12] Amici incorrectly state that Article XXVIII imposes contribution limits on issue committees. Br. of Amici at 6.

Florida law subjected groups to the full panoply of PAC-like requirements "if they engage in *any* amount of speech related to elections, regardless of how minor a part of their overall activity." *Broward*, 2008 WL 4791004, at *13. Similarly, the Utah law in *Nat'l Right to Work Legal Defense & Educ. Found., Inc. v. Herbert*, 581 F. Supp. 2d 1132 (D. Utah 2008), applied to groups making any disbursements intended to influence a ballot proposition. Like the Florida law, the Utah provision made no attempt to incorporate any "major purpose" requirement whatsoever. *Id.* at 1153.

Notably, the panel majority in *NCRTL* observed that, while North Carolina was right to believe that large organizations can have a substantial impact on the electoral process even if influencing elections is "merely one of" their major purposes, "narrower means exist[ed]" for North Carolina to achieve its objectives, including reduced reporting requirements limiting regulation to activity that is "unambiguously campaign related." *See NCRTL*, 525 F.3d at 290 (quoting *Buckley*, 424 U.S. at 80). Colorado has taken just such an approach through Rule 4.15. In sum, the provisions challenged here are distinguishable from the scheme held unconstitutional in *NCRTL*; hence, the rulings are not in conflict.

Finally, Colorado's highest state court has not issued any final word construing the meaning or scope of the challenged provisions as a matter of state law, or otherwise weighed in on their federal constitutionality. The Colorado Supreme Court may therefore resolve any alleged conflict with the Fourth

Circuit. The court may have denied certiorari review here because it recognized that the circumstances of the case render it a poor vehicle to address the substantive issues raised. In any event, groups like the Institute are treated no differently in the Fourth Circuit under *NCRTL* than here in Colorado, as they are exempt from regulation under either ruling.

III. The Colorado Court of Appeals' rulings were consistent with the First Amendment and this Court's precedents.

The Colorado Court of Appeals correctly rejected the Institute's facial constitutional challenges. These rulings were consistent with this Court's precedents.

A. Colorado's definition of "issue committee" is not unconstitutionally vague.

The Institute claims that the definition of issue committee is facially unconstitutionally vague because it employs the modifier "*a*" instead of "*the*" before the phrase "major purpose." The Institute suggests that *the* major purpose of an organization is easily and objectively determinable, yet *a* major purpose is inherently vague and entirely subjective. Pet. 21. In other words, the Institute claims, it is impossible for a group that has more than one purpose to determine whether one of those multiple purposes is "major." The Court of Appeals correctly rejected this contention.

This Court specifically adopted the phrase "major purpose" as a narrowing construction to save the definition of "political committee" from claims of unconstitutional vagueness. *See Buckley*, 424 U.S. at 77-79 (narrowly construing the phrase "for the purpose of...influencing" to "avoid the shoals of vagueness"; holding that the term "political committee" "need only encompass organizations that are under the control of a candidate or the *major purpose* of which is the nomination or election of a candidate.") (emphasis added).

The Court expressed the concern that, absent this narrowing construction, the definition "could be interpreted to reach groups engaged *purely* in issue discussion." *Id.* at 79 (emphasis added). The Court's construction still provided for flexibility, however: the phrase "*major* purpose" necessarily contemplates that an organization may have other purposes in addition to electoral advocacy. In other words, *Buckley* did not hold that the definition of political committee could constitutionally reach only groups whose "sole" or "exclusive" purpose was nominating or electing candidates. Rather, the Court's "major purpose" construction simply ensured that the definition targeted the "core area" of "campaign-related" activity sought to be regulated by Congress. *See Buckley*, 424 U.S. at 79. By narrowly construing the term "political committee" to include only groups with a "major purpose" of electoral advocacy, it could be assumed that the expenditures of such a group would be, "by definition, campaign related," *id.*, and therefore such a group's activities could be regulated generally.

Buckley did not accord talismanic significance to whether "the" or "a" modifies "major purpose," or otherwise establish the modifier "the" as the constitutional boundary beyond which regulation is prohibited. *Cf. McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 190 (2003) (observing that *Buckley*'s narrowed construction of the phrase "relative to" as limited to express advocacy to avoid vagueness "was an endpoint of statutory interpretation, not a first principle of constitutional law"). The phrase "*a* major purpose" represents a narrowing construction that still meets the demands of *Buckley* because it still targets the "core area" of campaign-related activity that is permissibly regulated, while avoiding "reach[ing] groups engaged purely in issue discussion." *See Buckley*, 424 U.S. at 79; *see also NCRTL*, 525 F. 3d at 309 (Michael, J., dissenting).

The approach in *Buckley* is consistent with that taken in a related context in *United States v. Harriss*, 347 U.S. 612 (1954).[13] There, this Court narrowly construed the phrase "principal purpose" in a federal lobbyist disclosure law to avoid vagueness. *See Harriss*, 347 U.S. at 618-24. The Court reasoned that the term "principal" was adopted to ensure that contributions that were substantially directed to influencing legislation were covered, yet exclude contributions having only an "incidental" purpose of influencing legislation. *See id.* at 622. The Court

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[13] The Institute notes that the "major purpose" test in *Buckley* was derived from *United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1139-42 (2d Cir. 1972). Pet. 13-14. Notably, that Second Circuit decision cites the key passage in *Harriss* discussed here. *See Nat'l Comm. for Impeachment*, 469 F.2d at 1141 (citing *Harriss*, 347 U.S. at 622-23).

observed that to construe the provision to cover only contributions and activities *exclusively* designed to influence legislation would permit a significant amount of conduct to escape regulation: "If it were otherwise – if an organization, for example, were exempted because lobbying was *only one of its main activities* – the Act would...be reduced to a mere exhortation against abuse of the legislative process." *Id.* at 622-23 (emphasis added).

The phrase "a major purpose" still comports with *Buckley* because it cannot be "interpreted to reach groups engaged purely in issue discussion," *Buckley*, 424 U.S. at 79, or even groups that only "occasionally" engage in actual ballot issue advocacy. Moreover, under Rule 4.15, a multi-purpose group with "a" major purpose of supporting or opposing a ballot measure will be regulated only to the extent that such activities are unambiguously campaign related.

Whether one seeks to identify "a major purpose" or "the major purpose" of an organization, the same analysis and evidence may be considered to determine whether ballot issue advocacy constitutes a principal portion of the organization's total activities. App. 15; *NCRTL*, 525 F.3d at 328 (Michael, J., dissenting). If a court considers a variety of objective factors to discern whether a group has ballot issue advocacy as its one central major purpose, then logically it may consider the very same factors to discern whether a group has "at least one" such major purpose. Here, the ALJ considered the length of time the Institute had been in existence; its original purpose; its organizational structure; the various issues with which it had been involved over time; and the amount of money

expended on the radio ads in proportion to its annual budget, and readily concluded that the Institute did *not* have a major purpose of supporting or opposing Referendum C. As the district court observed, the ALJ's task "did not prove overly difficult." App. 35.

B. Colorado's definition of "issue committee" is not facially overbroad.

The Court of Appeals correctly held that the definition of "issue committee" does not burden a substantial amount of constitutionally protected speech. App. 18-20.

Facial invalidation based on overbreadth is "strong medicine" used "sparingly and only as a last resort." *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973). The Institute bears the burden of demonstrating, from the text of the law and from actual fact, that the overbreadth is not only real, but substantial, judged in relation to the provision's plainly legitimate sweep. *See Virginia v. Hicks*, 539 U.S. 113, 122 (2003); *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 (1988); *Broadrick*, 413 U.S. at 615.

As noted above, the Institute originally claimed that the definition of "issue committee" and the corresponding disclosure requirements were facially unconstitutional because a multi-purpose group deemed to be an issue committee must disclose *all* contributions to the organization, not just those related to ballot issue advocacy. When it became apparent that under Rule 4.15, a "multi-purpose issue

committee" need report only contributions and expenditures related to its ballot issue advocacy, the Institute recast its claims. It now claims that the definition is overbroad because it reaches groups that do not have a single major purpose of supporting or opposing ballot initiatives.

Colorado's definition of "issue committee" avoids burdening substantial amounts of protected speech. First, to be an issue committee in Colorado, a group must actually "support or oppose" a ballot issue or question. Groups like the Institute that simply "educate" the public do not meet the definition because to "support or oppose" an issue requires a group to take a position advocating the passage or defeat of the measure. *Cf. McConnell*, 540 U.S. at 170 n.64 (the words "support" and "oppose" "provide explicit standards for those who apply them and give the person of ordinary intelligence a reasonable opportunity to know what is prohibited") (internal quotations omitted).

Second, unlike the campaign finance regulations in *NCRTL, National Right to Work Legal Defense and Educ. Found., Inc.*, and *Broward Coalition*, Colorado's definition also establishes a $200 threshold trigger before a group will be deemed an issue committee.

Third, even if a group "supports or opposes" a ballot measure and spends $200 or more toward that effort, it is still not an issue committee if ballot issue advocacy is not a "major purpose" of the organization. Contrary to the Institute's contentions, a group that only "occasionally engage[s] in ballot measure advocacy" does *not* meet the definition. Pet. 5.

Finally, any overbreadth concerns raised by the Institute exist only for a "multi-purpose issue committee," *i.e.*, an organization that has multiple purposes, only one of which is a major purpose of supporting or opposing a ballot measure. However, Rule 4.15 ensures that a multi-purpose issue committee shall *not* be required to report donations, membership dues, or any other receipts except to the extent they are specifically designated or intended to be used for the purpose of supporting or opposing one or more ballot questions. 8 Colo. Code Regs. § 1505-6(4.15(a)). App. 157.

Rule 4.15(a) strikes a balance between a contributor's privacy interests and the government's interest in informing the electorate of who is funding a particular ballot issue campaign. The rule requires disclosure only of contributions or expenditures made for the purpose of supporting or opposing ballot measures. It also permits a multi-purpose issue committee to use general non-earmarked funds to support or oppose a ballot measure, and requires that such an expenditure be reported simply as a contribution from the multi-purpose issue committee itself. Thus, where a donor contributes general, non-earmarked funds to the multi-purpose issue committee, the committee may later transfer such funds to its separate bank account used for ballot issue advocacy and report that transfer as a contribution from the organization, without disclosing the identity of the original donor.

In sum, the Institute cannot show that the definition of "issue committee" regulates a substantial amount of protected speech, either in an

absolute sense or relative to its application to groups engaged solely in ballot issue advocacy. Colorado's definition, as narrowly construed through administrative regulations, complies with *Buckley*, as these provisions are tailored to regulate only unambiguously campaign related activity. *See Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 495 n.5 (1982) (in considering a facial overbreadth challenge to a law, a court must consider any limiting construction that an enforcement agency has offered).

C. Colorado's disclosure requirements for issue committees do not violate the right to anonymous speech.

Finally, the Court of Appeals correctly rejected the Institute's claims that the disclosure requirements for issue committee violate the right to engage in anonymous speech and association.

The Institute relies on *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), to contend that Colorado's disclosure requirements violate the right to anonymous speech. The Institute further suggests there is an "inherent tension" between *McIntyre* and the holdings in *Buckley* and *McConnell* requiring this Court's intervention here. Pet. 25.

The Institute's reliance on *McIntyre* is misplaced; the campaign finance disclosure provisions at issue here are categorically different from the handbill disclaimer provision in *McIntyre*. That Ohio provision required speakers to reveal their identity

on actual documents (*e.g.*, handbills, leaflets, etc.) distributed to the public and intended to influence the electoral process. In short, it required individual speakers to reveal their identity contemporaneously with the delivery of a specific political message contained in a document. The Court thus deemed the disclaimer provision to be "a direct regulation of the content of speech." *McIntyre*, 514 U.S. at 345.

There exists no "inherent tension" between *McIntyre* and *Buckley*, as the *McIntyre* Court expressly distinguished the disclosure provisions in *Buckley*. *Id.* at 353. Indeed, the *McIntyre* Court described the mandatory financial reporting of campaign-related expenditures in *Buckley* as a "far cry from compelled self-identification on all election-related writings" covered by the Ohio law. *Id.* at 355.

Buckley acknowledged that compelled disclosure implicates privacy of association and belief. *Buckley*, 424 U.S. at 64, 65-66. This Court nevertheless identified three distinct government interests "sufficiently important" to justify compelled disclosure, including the government's substantial interest in providing the electorate with information as to "where ...campaign money comes from and how it is spent". *Id.* at 66; *see also McConnell*, 540 U.S. at 197 (acknowledging the First Amendment interest of individual citizens "seeking to make informed choices in the political marketplace") (internal quotations omitted).

The Court has never recognized a generalized right to anonymous speech. *McIntyre*, 514 U.S. at 379-80 (Scalia, J., dissenting). The Court has

acknowledged that disclosure of contributions to candidates and parties may deter some individuals who might otherwise contribute, and may even expose some contributors to harassment or retaliation. *See Buckley*, 424 U.S. at 68. Nonetheless, the Court acknowledged that "disclosure requirements certainly in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.* The Court therefore has "recognized a right to an *exemption* from otherwise valid disclosure requirements on the part of someone who could show a 'reasonable probability' that the compelled disclosure would result in 'threats, harassment, or reprisals from either Government officials or private parties.'" *McIntyre*, 514 U.S. at 379 (Scalia, J., dissenting); *see also Buckley*, 424 U.S. at 74. Under this approach, "[a]nonymity can still be enjoyed by those who require it, without utterly destroying useful disclosure laws." *Id.* at 380 (Scalia, J., dissenting).

In sum, only specific evidence of threats or harassment will justify an exemption from disclosure of contributions and expenditures. As discussed above, the record here is devoid of any such evidence. Instead, the Institute contends that disclosure *always* poses an unconstitutional burden on speech. The Colorado Court of Appeals properly rejected this facial attack.

The Court of Appeals also correctly concluded that, although this Court has not squarely addressed the constitutionality of disclosure of contributions and expenditures in ballot issue campaigns, dicta in

this Court's post-*Buckley* decisions reflect the implicit approval of financial disclosures in ballot issue elections.

In both *Bellotti* and *Citizens Against Rent Control*, this Court struck down *substantive limits* on the quantity of speech in ballot issue campaigns. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (striking criminal statute prohibiting corporations from making contributions or expenditures for the purpose of influencing or affecting the vote on any question submitted to the voters other than one materially affecting the corporation); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981) (striking $250 limit on contributions to committees formed to support or oppose ballot measures). In each of these cases, however, this Court noted in dicta that the disclosure provisions that remained in place served the voters' interest in the ballot issue context. *See Bellotti*, 435 U.S. at 792 n.32; *Citizens Against Rent Control*, 454 U.S. at 299-300.

Similarly, in *Buckley v. American Const. Law Foundation*, 525 U.S. 182 (1999) ("*ACLF*"), a decision issued after *McIntyre*, this Court addressed the disclosure of contributions and expenditures in Colorado at the petition stage of a ballot issue campaign. Although the Court struck down, among other things, a disclosure provision requiring petition circulators to wear identification badges, it emphasized that its decision "separates petition circulators from the proponents and financial backers of ballot initiatives," *ACLF*, 525 U.S. at 194 n.16, noting that, "Through the disclosure

requirements that remain in place, voters are informed of the source and amount of money spent by proponents to get a measure on the ballot; in other words, voters will be told who has proposed [a measure], and who has provided funds for its circulation." *ACLF*, 525 U.S. at 203 (internal quotations omitted).

In sum, the Colorado Court of Appeals correctly interpreted post-*Buckley* decisions of this Court to indicate that the voter informational interest articulated in *Buckley* justifies disclosure of contributions and expenditures in ballot issue campaigns.

CONCLUSION

The petition for writ of certiorari to the Colorado Court of Appeals should be denied.

Respectfully submitted,

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